

Protest of)
) Date: June 9, 1988
ENGINEERED SYSTEMS & DEVELOPMENT)
CORPORATION)
)
Solicitation No. 104230-87-B-0091) P.S. Protest No. 88-15

DECISION

Engineered Systems and Development Corporation (ESD) protests the March 7, 1988, award of a contract for 118 Model 775 Flat Mail Sorting Machines to ElectroCom Automation, Inc. (ElectroCom).

During the period November, 1987, through January, 1988, the Postal Service requested, by letter, proposals from three contractors for 118 Model 775 Flat Mail Sorting Machines.^{1/} AEG Aktiengesellschaft (AEG) has licensed the use of the technical data package for the Model 775 Flat Mail Sorting Machine to five companies -- ESD, ElectroCom, Advanced Development Engineering Center (ADEC), UNISYS, and Kodak. Competition was limited to three companies, ESD, ElectroCom, and ADEC, which had recent experience in producing the Flat Mail Sorting Machines for the Postal Service. Each offeror was requested to propose on a solicitation structured consistently with its previous performance. Thus, the terms of each letter request for proposal differed, in some degree, from the others.

Each offeror submitted a proposal. The contracting officer determined that ESD and ADEC were nonresponsible pursuant to Postal Contracting Manual (PCM) 1-903.1(iii). ESD was found nonresponsible based upon problems encountered in performance under Contract No. 104230-87-D-0140 for Flat Mail Sorting Machines, citing four specific reasons: (1) a cure notice, dated December 16, 1987, had been issued to ESD by the Postal Service for failure to comply with quality assurance provisions; (2) ESD has required fifteen retests of equipment which did not pass the acceptance test; (3) the field installation crews, obtained by ESD from local labor pools at the installation sites, did not appear competent to install, debug, and present the equipment for testing; and (4) acceptance of Flat Mail Sorting equipment was behind schedule, reflecting a 42% delinquency rate, as of February 29.

^{1/}A one-time deviation, pursuant to 1-111.2 of the Postal Contracting Manual (PCM), was granted to obtain pricing for the requirement by letter instead of a solicitation.

ESD was notified by a letter dated March 7, and by an oral communication of the contracting officer on March 8, that the Postal Service could not make an affirmative determination of ESD's responsibility, since ESD was currently behind schedule on Contract No. 104230-87-D-0140 for Flat Mail Sorting Machines and that award had been made to ElectroCom by letter contract, dated March 7. This protest, received on March 23, 1988, followed.

ESD's initial letter protests the award to ElectroCom on five grounds: (1) the exclusion of ESD is a de facto debarment of ESD; (2) the award included an option for fifty units, not contained in ESD's Request for Proposal, and therefore the evaluation was on a different basis than upon which ESD submitted its proposal and was a cardinal change [sic]; (3) the award was in violation of Postal Service regulations that each proposal be based upon the offeror's own technical data package; (4) the award was made without discussions or a request for best and final offers; and (5) the use of a letter contract was inappropriate.

In an April 7 supplemental submission for its protest ESD asserts as additional grounds for its protest that there exists "significant and readily apparent" differences between ESD's contract (104230-87-D-0140) and ElectroCom's (104230-88-W-1222) based upon a side-by-side comparison.^{1/} ESD argues that more onerous requirements were imposed upon ESD in comparison with those levied upon ElectroCom, making ESD's proposal more costly.

In his report to this office, the contracting officer notes that: (1) ESD has not been de facto debarred because the nonresponsibility finding at issue relates only to this specific contract award; (2) the option quantity was not used in the evaluation of proposals under the solicitations and was only included in the ElectroCom contract after it had been selected for award; (3) ElectroCom was required to adhere to all the requirements of the technical data package under which ESD has performed; (4) there is no regulatory requirement for requesting best and final offers; and (5) use of a letter contract is specifically contemplated by the PCM and was properly justified in the contract file. In addition, he states that the April 7 supplement submitted by ESD is untimely. ESD criticizes the contracting officer's report, by letter dated April 28. The critique elaborates upon issues raised in its March 23 protest. In addition, the critique responds to the contracting officer's statements regarding issues raised in ESD's April 7 supplement to its March 23 protest. While ESD does not address the timeliness of the April 7 issues, it states that the contracting officer is incorrect in his discussion of the merits of the supplement.

^{2/}ESD states that it received a copy of ElectroCom's contract on March 25.

By letter of May 4, the contracting officer responded to ESD's critique of his report. The contracting officer states that none of the criticisms of his report are valid or assert any new information. The contracting officer restates his assertion that the critique is untimely.

Discussion

There is an initial question of the timeliness of the initial protest. Our regulations governing bid protests, PCM 2-407.8, provide, at d. (3):

[P]rotests [other than those apparent in the face of the solicitation] must be received not later than 10 working days after the information on which they are based is known or should have been known, whichever is earlier; provided that no protest will be considered if received more than 15 days after award of the contract in question.

As our prior decisions repeatedly state, the timeliness requirement imposed by the regulations is jurisdictional. We cannot consider the merits of any issue which has been untimely raised. Federal Systems Group, P.S. Protest No. 88-12, April 26, 1988; Service America Corporation, P.S. Protest No. 87-119, December 15, 1987; Bessemer Products Corporation, P.S. Protest No. 86-05, March 26, 1986; POVECO, Inc., et al., P.S. Protest No. 85-43, October 30, 1985. This office has no authority to waive or disregard untimeliness. Federal Systems Group, *supra*; Air Transport Association of America, P.S. Protest No. 84-29, May 17, 1984, aff'd on reconsideration, June 1, 1984; James W. and Joan C. Carroll, P.S. Protest No. 82-13, August 27, 1982.

A protester is "charged with knowledge of a basis for protest" when the contracting officer conveys to the protester a position adverse to the protester's interest. Computer Systems & Resources, P.S. Protest No. 87-38, June 24, 1987; Brandon Applied Systems, Inc., Comp. Gen. Dec. B-188738, December 21, 1977, 77-2 CPD & 112. A protester may not delay filing a protest until it is certain that it is in a position to detail all of the possible grounds of facts underlying its protest. Computer Systems & Resources, *supra*; Blue Cross-Blue Shield of Tennessee, Comp. Gen. Dec. B-210227, May 23, 1983, 83-1 CPD & 555; Kappa Systems, Inc., Comp. Gen. Dec. B-187395, June 8, 1977, 77-1 CPD & 412. Moreover, written notification of the adverse action of the grounds of the protest is not required; oral notification of the basis of a protest is sufficient to start the 10-day period. Federal Systems Group, Inc., *supra*; see also Evans Suppliers Co., Inc., P.S. Protest No. 84-42, June 21, 1984 citing FLS, Inc., Comp. Gen. Dec. B-212066, July 21, 1983, 83-2 CPD & 109.

It is undisputed that ESD knew from its March 8 telephone conversation with the contracting officer that the contract was awarded to ElectroCom and that ESD had been determined to be nonresponsible because it was behind schedule on Contract No. 104230-87-D-0140, an associated contract. ESD's protest, dated March 22, was received by our office on March 23, 11 working days after the telephone conversation of March 8. The grounds raised in ESD's initial protest letter, which consist almost entirely of attacks on the award to ElectroCom, as well as a small section disputing the contracting officer's determination of ESD's nonresponsibility, were known to it on March 8. Therefore, these grounds of protest are untimely raised.

The new allegations of the supplemental comments and the response to the contracting officer's report, that the award and contract to ElectroCom is on a different basis that upon which ESD submitted its proposal, must be examined for timeliness in light of the proscription that no protest will be considered if received more than 15 days after award of the contract. The supplemented was received by this office on April 7, more than 20 working days after the contract was awarded. The supplementary protest issues do not meet the fifteen-day requirement of PCM 2-407.8 d. (3), and the allegations contained therein must be dismissed as untimely. International Jet Aviation, P.S. Protest No. 87-36, September, 1, 1987; CACI Systems Integration, Inc., P.S. Protest No. 87-79, August 27, 1987.^{1/}

The protest is dismissed as untimely.

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[checked against original JLS 2/23/93]

^{3/}There is an additional issue of the standing of the protester to raise the issues challenging the award to ElectroCom. According to the PCM, in order for a protest to be considered on its merits, the protester must be an "interested party". PCM 2-407.8 c. The basic test of whether the protester is an interested party is whether it could be eligible for award if the protest were upheld. Safety Technology, Inc. and Con-Serv, Inc., P.S. Protest Nos. 85-85 and 86, December 31, 1985; Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985. To the extent that ESD's protest consists of allegations that the award to ElectroCom was improper, as a nonresponsible offeror, ESD lacks standing to raise those issues.